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# Eighth Place: John Ashcroft, et al. v. Free Speech Coalition, et al.

Louis Smith

Marcie Norton

# EIGTH PLACE

No. 00-795

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 2001

JOHN ASHCROFT, et. al.,

*Petitioners*,

-against-

FREE SPEECH COALITION, et. al.,

*Respondents*.

On Writ of Certiorari to the United States

Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

November 17, 2001
Round # 4: 6:00 P.M.

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## QUESTIONS PRESENTED

1. Did the Ninth Circuit err by determining that the CPPA is unconstitutional under a content-neutral analysis, even though the CPPA is designed to curb secondary effects, is designed to serve a substantial government interest, and offers adequate alternative channels for communication?

2. Did the Ninth Circuit err by determining that if the CPPA is content-based, it is unconstitutional, even though it is narrowly tailored to meet compelling government interests?

3. Did the Ninth Circuit err by determining that the statutory phrases "appears to be a minor" and "conveys the impression" are so vague that the CPPA fails to give notice of prohibited conduct and are so overbroad as to impermissibly inhibit protected speech even though the statutory language is crucial to the protection of children against sexual exploitation?

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# BRIEF FOR THE PETITIONERS

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners, United States Attorney John Ashcroft and the United States Department of Justice, respectfully submit this brief and request that this Court REVERSE the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 198 F.3d 1083 (9th Cir. 1999).

## STATUTORY PROVISIONS INVOLVED

The statute relevant to the disposition of this case is 18 U.S.C. section 2256.

## STANDARD OF REVIEW

A constitutional challenge of a federal statute is reviewed de novo. See Elder v. Holloway, 510 U.S. 510, 516 (1994).

## STATEMENT OF THE CASE

### Preliminary Statement

On January 27, 1997, The Free Speech Coalition ("Respondents") filed a complaint against the Department of Justice and former U.S. Attorney General Janet Reno ("Petitioners") in the Federal Court for the Northern District of California. J.A. 1:1. The complaint challenged 18 U.S.C. § 2256, known as the Child Pornography Prevention Act of 1996 ("CPPA"). J.A. 1:1. The CPPA prohibits any visual depiction that appears to be of a minor engaging in sexually explicit conduct, or a depiction that is distributed in a way that conveys the impression that the material contains a depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256 (1996).

Respondents' complaint sought declaratory and injunctive relief from the CPPA, alleging: 1) that the language of the CPPA is unconstitutionally overbroad and vague; 2) that the CPPA bans or unduly burdens constitutionally protected speech; and 3) that the CPPA unduly chills constitutionally protected speech. J.A. 1:8. Inherent to Respondents' complaint is the assertion that the CPPA, in seeking to quash child pornography, fails to serve a compelling government interest. J.A. 1: 6. Respondents also assert that the statute is content-based and fails to meet the strict scrutiny standard for content-based regulations. J.A. 1:8.

In their March 31, 1997 response to Respondents' claim, Petitioners moved for dismissal with prejudice on the following bases: 1) the District Court lacked subject matter jurisdiction; 2) 12(b)(6) failure to state a claim; and 3) a general denial of the remaining averments of the complaint. J.A. 1:10-14. The District Court granted Petitioners' motion on August 12, 1997. J.A. 1:85. Respondents timely appealed to the Ninth Circuit U.S. Court of Appeals on August 13, 1997. J.A. 1: 87. The Ninth Circuit reversed the ruling of the District Court in part, holding that the CPPA is content-based and fails to withstand strict scrutiny, but that the removal of the phrases "appears to be a minor" and "conveys the impression" would safeguard the constitutionality of the statute. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999), cert. granted, 2001 U.S. LEXIS 944 (January 22, 2001). This Court granted certiorari on January 22, 2001.

## Statement of Facts

Perhaps the most notable aspect of our legislature's efforts to stamp out child pornography in this country is the frequency with which new laws aimed at protecting children from pornographic exploitation are enacted. This is because the nature in which child pornography is practiced constantly evolves; its practitioners adapt their behavior over time so as to eventually render the laws protecting children largely inapplicable.

This lamentable phenomenon became apparent soon after Congress, having recognized the tremendous threat posed by the commerce of child pornography, enacted the Protection of Children Against Sexual Exploitation Act of 1977 ("the 1977 Act"). 18 U.S.C. §§ 2251 (1977). Attacking child pornography by treating it as a traditional kind of commerce, governed by the economic principles of supply and demand, the 1977 Act prohibited the use of children in sexually explicit materials transported in interstate or foreign commerce. New York v. Ferber,

458 U.S. 747 (1982). In the wake of Ferber, which established that depictions of minors engaged in sexually explicit acts lay outside the protection of the First Amendment whether or not such depictions were obscene, Congress was authorized to enact outright bans on child pornography. In combination with Congress' realization that child pornography had become a largely non-commercial industry, frustrating the 1977 Act's goals, the Ferber holding led to the enactment of the Child Protection Act of 1984 ("the 1984 Act"). 18 U.S.C. §§ 2251-53 (1984). The 1984 Act prohibited the production, distribution, or receipt of materials depicting minors engaged in sexual acts, obscene or not, and regardless of the defendant's profit motive. Id.

In 1986, Congress amended the law again by enacting the Child Sexual Abuse and Pornography Act ("the 1986 Act"), which furthered the goal of destroying the market for child pornography by banning the production and use of advertisements for child pornography. 18 U.S.C. § 2251 (1986). As computer technology began to advance, giving users the ability to store large amounts of data in the form of images in a relatively small and secure place, Congress continued working to keep pace with child pornographers by enacting the Child Protection and Obscenity Enforcement Act of 1988 ("the 1988 Act"). 18 U.S.C. §§ 2251A-2252 (1988). The 1988 Act required that all producers of sexually oriented materials maintain records of the participants' ages and prohibited the use of a computer for transportation, distribution, or receipt of child pornography. Thus, the enactment of the 1988 Act marked Congress' continuing effort to remove any shelter child pornographers might find within the sex industry.

By 1990, Congress' diligence had forced the child pornography market completely "underground." This Court drew specific attention to that development in upholding an Ohio statute that banned simply possessing and viewing child pornography. Osborne v. Ohio, 495 U.S. 103, 110 (1990). As after Ferber, Congress acted swiftly to extend the protection offered by

a state statute to federal law, by enacting the Child Protection Restoration and Penalties Enhancement Act of 1990 ("the 1990 Act"). 18 U.S.C. § 2252(a)(4) (1990). The 1990 Act criminalized the possession of three or more pieces of child pornography, and was augmented in 1994 to punish importation of child pornography and to mandate restitution for its victims. 18 U.S.C. § 2259 (1994).

The CPPA is Congress' necessary, most recent response to drastic changes in the market for child pornography. Technological advances now enable child pornographers to easily alter images depicting sexual conduct. J.A. 1:30. These images can be altered to appear as though the adult subjects of the sexual depictions are identifiable minors. J. A. 1:39. More insidiously, pornographers are able to use actual minors to record a sexual performance, editing the images afterward so as to obscure the identity of the minor. J.A. 1:38-39. That obfuscation of identity allows the sexual exploitation of children with impunity because current legislation, without the benefit of the CPPA, would allow child pornographers the defense that any suspicious images were pure products of technology, not involving any real person.

## SUMMARY OF ARGUMENT

The CPPA is constitutional because it is a content-neutral statute that survives intermediate scrutiny in that it is narrowly tailored to promote substantial government interests and offers adequate alternative means of expression. Even if appraised under the higher strict scrutiny standard used to assess content-based statutes, the CPPA survives because it promotes a compelling government interest by using means least restrictive to otherwise protected speech. The CPPA sufficiently defines proscribed conduct so as to give an ordinary person notice of what conduct is prohibited, thereby passing the constitutional vagueness test. Additionally, the

CPPA is within constitutional limits on overbreadth because any incidental effects on free speech are insubstantial in relation to the CPPA's prevention of grave harm to children.

The targeted harms of the CPPA are the secondary effects of child pornography. Specifically, Congress has enumerated the aims of the CPPA as preventing the sexual exploitation of children, preventing the inducement of children into acquiescent participation in sexual activity, and destroying the rampant, self-perpetuating market for child pornography. Although the CPPA identifies banned material by reference to the content of that material, this Court has determined that a statute can distinguish proscribed speech on the basis of the speech's content, yet remain content-neutral if the statute targets the secondary effects of the speech rather than the ideas expressed. This Court has also determined that the specific harms targeted by the CPPA are indeed compelling, easily surpassing the intermediate scrutiny standard. The CPPA also preserves an adequate, alternative manner for constitutionally protected expression by allowing pornographers wishing to portray youthfulness to use young-looking adults whose ages are properly documented.

Given the ever-advancing capabilities of computer technology and the paralyzing difficulties this posed to the enforcement of previous child pornography statutes, the language of the CPPA in its current form is vital to the protection of children. As such, the CPPA uses means that are least restrictive to otherwise protected speech. And because the government's interests in preventing child pornography are compelling, the CPPA withstands the content-based strict scrutiny test.

Likewise, the CPPA meets a constitutional challenge asserting impermissible vagueness because the statute is easily understood by an ordinary person and does not encourage arbitrary and discriminatory enforcement. The statutory phrases "appears to be a minor" and "conveys the

impression" supply the ordinary person with fair warning of the proscribed conduct. Further, this Court has never held that a statute encourages arbitrary and discriminatory enforcement simply because it contains a subjective element; virtually all law enforcement requires subjective reasoning of some degree. Something more is required, such as a statutory conviction based purely upon one officer's subjective impression, without the benefit of judge and jury.

Furthermore, the CPPA is well within constitutional limits on overbreadth. In order to be constitutionally flawed on grounds of overbreadth, a statute's threat to protected speech must be substantial in relation to legitimately banned speech. In conducting this analysis, courts must weigh the legitimate value of constitutionally protected speech likely to be affected, not merely the frequency with which such speech might occur. The court then compares that value to the gravity of the harms protected. This Court has determined that the speech likely to be incidentally affected by the CPPA has minimal or no value, whereas the interests protected by the CPPA are compelling. The CPPA thus meets a challenge of overbreadth. Further, this Court has determined that statutes pertaining to child pornography should be given constitutional leeway. In addition, the Court's prerogative to apply a limiting construction further ensures the protection of speech not intended to fall under the CPPA's proscription.

Finally, consideration of policy urges upholding the constitutionality of the CPPA. Technological advancements have created ripe new territory for child pornography to explode unchecked. In the face of these advancements, the CPPA is necessary to protect children from harms to which they would otherwise be completely exposed. Additionally, the CPPA is necessary to effectively seal off the market for legitimate adult pornography from infiltration by child pornographers. Because the CPPA is constitutional in spite of doctrinal challenges and is further supported by sundry policy concerns, this Court should uphold the CPPA.

## ARGUMENT

### I. THE NINTH CIRCUIT ERRED BY FINDING THAT THE CPPA IS UNCONSTITUTIONAL BECAUSE THE CPPA IS CONTENT-NEUTRAL UNDER THE SECONDARY EFFECTS DOCTRINE, IS NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTERST, AND LEAVES OPEN ALTERNATIVE CHANNELS FOR COMMUNICATION.

A statute is considered content-neutral if its principal purpose is to curb socially adverse secondary effects. City of Renton v. Playtime Theaters, 475 U.S. 41, 46-48 (1986). Courts measure such regulations using a standard of intermediate scrutiny. Id. A content-neutral statute survives this intermediate level of scrutiny if it is narrowly tailored to meet a substantial government interest and leaves open sufficient alternative channels for communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

The CPPA is a content-neutral regulation because its primary purpose is to curb the harmful secondary effects of child pornography on children. 18 U.S.C. § 2251 (1999); J.A. 1:24. This Court has explicitly expressed special sensitivity for the secondary harms caused to children who are not actually used in the creation of child pornography. Osborne v. Ohio, 495 U.S. 110, 111 (1990).

Here, the CPPA easily meets the intermediate scrutiny test for content-neutral regulations because it is narrowly tailored to meet a substantial government interest and it leaves open alternative channels for communication. Renton, 475 U.S. at 50; see generally Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 722 (9th Cir. 2000). This Court has held that protecting children from the harms of child pornography advances a substantial government interest. Ferber, 458 U.S. at 756-57. Furthermore, by limiting its applicability to depictions of actual or virtual images that appear to be of children and that are promoted as child pornography, the CPPA leaves open alternative channels for communication.

A. The CPPA Is Intended To Prevent The Secondary Effects Of Child Pornography On Children.

A statute that is designed to eliminate a secondary effect is justified without reference to the content of the speech and is therefore content-neutral. Renton, 475 U.S. at 47-49; see generally American Library Assn. v. Reno, 33 F.3d 78, 86 (D.C. Cir 1994) (indicating that differential treatment should be given to even a content-based regulation if the regulated speech is associated with a particular secondary effect). A secondary effect is an adverse consequence that is unrelated to the content of the speech. Gilleo v. Ladue, 986 F.2d 1180, 1183 (8th Cir. 1993) (citing Renton, 475 U.S. at 47-49). When assessing the secondary effects of a regulation, the government's purpose for enacting the statute is a controlling consideration. Ward, 491 U.S. at 791. Moreover, even if a statute has an effect on some speakers but not on others, it remains content-neutral if it serves a purpose unrelated to the content of the speech. Ranch House, Inc. v. Amerson, 238 F.3d 1273, 1278 (11th Cir. 2001).

In Renton, this Court held a zoning ordinance that prohibited adult movie theaters from locating within a certain area to be content-neutral because the ordinance sought to curb secondary effects. 475 U.S. at 41. Specifically, the Court determined that the ordinance was intended to prevent crime, protect local businesses, preserve neighborhoods, and ensure the quality of life – rather than stifle the expression of unpopular views. Id. at 48. Additionally, in American Library Assn., legislation requiring documentation of children portrayed in sexually explicit material was found to be content-neutral because it was enacted to protect children from the secondary harms associated with the production and distribution of child pornography, even though the statute identified material only by reference to its content. 33 F.3d at 86.

Here, Petitioners do not rely on a "paternalistic interest" in regulating people's minds. Osborne, 495 U.S. at 109. Rather, the CPPA was enacted in order to protect children from the

secondary harms caused by that pornography. The CPPA is not intended to regulate or ban the *ideas* of child pornography, but rather it is intended to counteract the *effect* child pornography has on children and society at large. Like the ordinance in Renton, the CPPA was designed to prevent crime, protect society, and to protect children, not to suppress the expression of disliked views. 475 U.S. at 41.

In passing the CPPA, Congress found that virtual child pornography poses threats to real children, even when real children are not used in the actual production of the child pornography. 18 U.S.C. § 2251; J.A. 1:25. This Court has already demonstrated a willingness to consider the effects of child pornography on those children that were not depicted in the images themselves. Osborne, 495 U.S. at 110-11. In U.S. v. Mento, the Fourth Circuit reasoned that "logically. . . the connection between virtual child pornography and the sexual abuse of children is as powerful as the causal link that justifies the utter prohibition of pornographic images involving actual child participants." 231 F.3d 912, 920 (4th Cir. 2000).

Congress has determined that virtual child pornography can be used to seduce children into sexual activities. J.A. 1:25. For instance, a child who may be reluctant to engage in sexual activities with an adult can sometimes be convinced by seeing depictions of other children (real or virtual) "having fun" participating in similar activities. Id. In Osborne, this Court held that an Ohio statute banning possession of child pornography was constitutional by considering both the harm caused to the children used in the actual production of the pornography, and the harm that children would suffer who were lured into sexual activity by viewing the child pornography. 495 U.S. at 108, 111.

Furthermore, Congress found that child pornography can "stimulate and whet" the appetite of sexual abusers and pedophiles. J.A. 1:25. This is a particular concern as computers

can produce visual depictions of child sexual activity designed to satisfy the particular individual preferences of child molesters and pedophiles. Id. This particularized form of child pornography can desensitize the viewer to the sexual abuse of children, making this abuse acceptable to and even preferred by the viewer. Id.

In addition to this potential harm, the trafficking in child pornographic images creates a potential for other types of harm in the community as a whole and creates a "clear and present danger" to all children. Id. For example, as the desires of child molesters and pedophiles increase, the demand for the creation and distribution of child pornography of all types also increases. Id.

Moreover, "the sexualization and eroticisation of minors" through child pornographic images has a harmful effect on all children by promoting a perception of children as sexual objects, which can lead to further sexual abuse and exploitation. Id. The harm generated from this sexualization, can create an "unwholesome environment" by negatively influencing the mental and emotional development of children and undermining parents' efforts to provide a healthy environment for their children. Id.

Furthermore, the creation and distribution of child pornography that contains the image of a recognizable minor invades the child's privacy, because images that are created showing any identifiable feature on the child engaging in sexually explicit conduct can "haunt the minor for years." Id. This Court held in Ferber that images of children in sexually explicit poses create a "permanent record of a child's abuse." 458 U.S. at 759. With recent advances in technology, even if a child never had direct contact with a child pornographer, a pornographic image of that child could be created, causing great emotional hardship and a permanent record of embarrassment and humiliation. J.A. 1: 39.

The Ninth Circuit dismissed these Congressional findings pertaining to the secondary effects of child pornography for lacking a nexus between computer-generated child pornography and the subsequent sexual abuse of children as a result. Free Speech Coalition, 198 F.3d at 1093. However, this Court held that courts must accord substantial deference to Congressional findings "out of respect for its authority to exercise the legislative power." Turner Broadcast System v. FCC, 520 U.S. 180, 195-96 (1997). Furthermore, this Court has specifically held that the legislative findings regarding the effects of child pornography should not be second-guessed. Ferber, 458 U.S. at 757-58. In enacting the CPPA, Congress relied on substantial evidence in its findings from the testimony of a myriad of experts. See Child Pornography Prevention Act of 1995: Hearing before the Senate Judiciary Committee, 104th Cong., 2d Sess. 35, 70, 122 (1996). As Congress' findings indicate, the CPPA is content-neutral because it was intended to thwart the secondary effects of child pornography.

B. The CPPA Is Constitutional Because It Satisfies The Content-Neutral Intermediate Scrutiny Requirements.

The intermediate scrutiny test for determining the constitutionality of a content-neutral regulation is whether the ordinance is narrowly tailored to serve a substantial government interest and allows for reasonable alternative channels of communication. Renton, 475 U.S. at 50. A content-neutral regulation will thus be upheld if it furthers a significant governmental interest that is distinct from the suppression of free speech and does not burden substantially more speech than needed to further those interests. Turner Broadcasting System, 520 U.S. at 189. Because the CPPA serves to protect children from the harms of child pornography and is limited to acts constituting child pornography, it meets the intermediate scrutiny test for content-neutral statutes.

1. The CPPA is narrowly tailored to serve a substantial governmental interest because it protects children from the harms associated with child pornography.

This Court has held that the requirement of narrow tailoring is fulfilled if the statute promotes a substantial government interest that could not be achieved as effectively absent the statute. Ward, 491 U.S. at 799 (citing U.S. v. Albertini, 472 U.S. 675, 689 (1985)). Even if the government's interest could be served by a less restrictive alternative, this Court has held that it will still pass constitutional muster as long as the means chosen is not substantially broader than what is necessary to achieve that interest. Id. at 800.

In Ward, this Court determined that a city ordinance regulating the volume of music played at a concert was content-neutral and that the government has a substantial interest in shielding its citizens from "unwelcome noise." Id. at 796. In Members of City Council v. Taxpayers for Vincent, this Court determined that a city's interest in preserving its aesthetics was substantial. 466 U.S. 789, 806 (1984); see American Legion Post 7 v. City of Durham, 239 F.3d 601, 609-10 (4th Cir. 2001). Furthermore, in Renton, this Court held that a substantial government interest existed in maintaining "the quality of urban life." 475 U.S. at 50. Other courts have found a substantial government interest to exist in preserving peace and quiet for citizens in the evenings, National Amusements v. Town of Dedham, 43 F.3d 731, 741 (1st Cir. 1995), and in deterring voter fraud, Hoffman v. Maryland, 928 F.2d 646, 649 (4th Cir. 1991).

When compared to the threshold established by these cases, the protection of children from the harms of child pornography certainly meets the substantial government interest standard for content-neutrality. This Court has recognized that the government

has a significant interest in protecting the well-being of children and shielding them from abuses. Ferber, 458 U.S. 756-57; see Ginsberg v. New York, 390 U.S. 629, 640-41 (1968) (citing Prince v. Massachusetts, 321 U.S. 158, 165 (1944)). Additionally, this Court has specifically found that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Ferber, 458 U.S. at 756-57.

The CPPA is narrowly tailored to meet this substantial government interest of protecting children from the harms of child pornography because absent the statute, the government's interest in protecting children from the increasing threat of computer generated child pornography could not be achieved. Ward, 491 U.S. at 799. For instance, in U.S. v. Kimbrough, the defendant relied on technological advances to argue that the government failed to meet its burden of showing that each pornographic image was of an actual child. 69 F.3d 723, 733 (5th Cir. 1995). Congress has found that as computer technology continues to advance, the enforcement of current laws against child pornography will become more difficult because it will be harder for the government to meet its burden of proving that the image is of a real child. J.A. 1:40. Therefore, the only way to protect children from the harms associated with computer generated child pornography is through the CPPA.

2. The CPPA leaves open alternative channels for communication because it is specifically limited to child pornography.

In addition to demonstrating a substantial government interest, a content-neutral regulation must also leave open "alternative avenues of communication." Renton, 475 U.S. at 47. Those alternatives must be "sufficiently similar to the method foreclosed by the regulation." Chesapeake and Potomac v. U.S., 42 F.3d 181, 203 (4th Cir. 1994). However, the requirement

that ample alternative channels be left open does not mean that there must be a means available where people can express themselves in the same manner as prior to the regulation. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (indicating that the First Amendment does not guarantee the right to communicate one's views at any time and in any place or manner that may be desired). Merely asserting some self-censorship as a result of a statute is not enough to render the statute unconstitutional. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989).

In Renton, this Court held that an ordinance restricting the location of adult movie theaters left open alternative channels of communication because the "First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." 475 U.S. at 54. Similarly, the CPPA does not completely prohibit possession and distribution of images appearing to be of children. Rather, it proscribes a narrow segment of such depictions – those images which appear to be of minors engaging in sexually explicit conduct. See infra 22-23 (discussing how to properly apply a limiting construction to the CPPA).

The CPPA allows individuals to communicate any message they desire, through any means they desire, as long as they are not depicting actual images or virtual images of children engaged in sexually explicit conduct. Even if a person were to purposefully find an adult who looked like a minor and depicted this person in a sexually explicit manner, as long as that image is not advertised or promoted as a minor engaging in sexually explicit conduct, that person would fall outside the confines of the CPPA as the affirmative defense specifically states. See 18 U.S.C. § 2252A(c). This leaves ample alternative avenues for artists, filmmakers, and adult pornographers avoid the threat of criminal prosecution. Significantly, unlike Renton, which was

concerned with protected speech, child pornography is unprotected speech. See Ferber, 458 U.S. at 747. Thus, the concern of having an alternative forum for communication is greatly lessened in the present case, as child pornography is not due first amendment protection. Id.

## II. EVEN ASSUMING THAT THE CPPA IS CONTENT-BASED, THE NINTH CIRCUIT ERRED IN DETERMINING THAT THE CPPA IS UNCONSTITUTIONAL BECAUSE THE CPPA MEETS THE STRICT SCRUTINY TEST.

If a statute is content-based, it is subject to a strict level of scrutiny; the statute must be narrowly tailored to serve a compelling government interest. Boos v. Barry, 485 U.S. 312, 321 (1988). A brief summary of the Congressional findings on the issue of child pornography reveals that such material is indeed rampant and in need of strong legislation:

> One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. Such magazines depict children, some as young as three to five years of age. . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism. In Los Angeles alone, police reported that 30,000 children have been sexually exploited.

Ferber, 458 U.S. at 749, n.1.

Based on that evidence, this Court enumerated the following five reasons that the legislature is entitled to greater leeway in the regulation of pornographic depictions of children, even when the statute doing so is content-based. First, the government's interest in safeguarding the physical and psychological well-being of a minor is so clearly compelling it does not require articulation. Id. at 756-57. The prevention of sexual exploitation and abuse of children likewise constitutes a government objective of surpassing importance. Id.

Second, Ferber emphasizes the intrinsic relationship between distribution of child pornography and sexual abuse of children. Id. at 759. According to the Court, this relationship functions in at least two ways. Id. The first function of this intrinsic relationship is the creation of a permanent record of a child's abuse, something from which that child will never be able to

escape. Ferber, 458 U.S. at 759. The second function of the relationship recognized by the Court is based on principles of economics: effective legislation can stop the supply of child pornography by suppressing the demand. Id. With regard to this matter, this Court thus concluded that severe criminal penalties are the most expeditious, if not the only practical method for combating the production of child pornography and its grave, unavoidable harms. Id.

This Court's third justification for granting additional leeway in the proscription of child pornography was related to the difficulty in suppressing child pornography merely by attacking supply through a ban on production. Id. at 761. Thus, realizing that merely banning the use of children in creating sexual images was not effective because of the "clandestine" nature of production, the Court approved a ban on distribution in order for a more balanced attack on the industry. Id. at 760, 762. The assumption was that an effort to destroy the supply of child pornography was hopeless without addressing both the production and distribution dimensions of the supply. Id.

The Ferber Court's fourth justification for granting legislative leeway with regard to regulating child pornography was that the artistic, literary, political, or scientific value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. Id. at 761-762. Finally, the fifth justification offered by this Court in Ferber for granting broader legislative leeway in outlawing child pornography, even if the statute enacted to do so is content-based, was that the evil restricted by the statute overwhelmingly outweighed the expressive interests at stake. Id. at 763-64.

In Ferber, the defendant was charged in violation of a New York statute prohibiting the promotion of sexual performances by minors. Id. at 751. The defendant asserted that the statute was unconstitutional because its ban was not limited to obscene materials, and the statute

therefore banned materials presumptively protected by the First Amendment. Ferber, 458 U.S. at 747. This Court upheld the New York statute, holding that child pornography is unprotected speech. Id.

As applied to the case at hand, Ferber's five justifications for granting legislative leeway in controlling child pornography are even stronger, showing that the CPPA is constitutional. First, the exploitation of children, as aided by computerized manipulation to disguise identity, is just as evil and potentially more destructive in its effects than it was at the time of Ferber. Therefore, our government's interest in suppressing those effects continues to be of surpassing importance. The technological aspect of today's market actually enhances the harms of Ferber's second justification, the "intrinsic relationship," because of the possibility of stigmatizing not only those children actually posing in sexually explicit materials, but those whose likenesses are edited into depictions in which they were not initial participants. In addition, the ubiquity and accessibility of technology make for a formidable marketplace. Furthermore, the high level of culpability related to such conduct continues to warrant stiff penalties.

The incredible accessibility of technology today also augments Ferber's third justification because means such as the Internet and e-mail create the potential for distribution on an exponential scale. Fourth, child pornography today retains no more legitimate value than it ever has. Therefore, in regard to the fifth justification, which is essentially a balancing test, child pornography remains a practice of such evil that a ban significantly outweighs any expressive interests at stake. See e.g. supra 22-23 (discussing the balancing of the CPPA's governmental interests against adversely affected expression).

In addition to enumerating five justifications for granting courts leeway in deciding the constitutionality of bans on child pornography in Ferber, this Court also emphasized that the

statute in question in that case was enacted in response to a change in the child pornography market, specifically the proliferation of the exploitation of children. Ferber, 458 U.S. at 757. The Court was bound to accord deference to the legislature's finding regarding a market change as the Court considered the validity of the state legislature's response. Id. Accordingly, in upholding a statute banning possession of child pornography in Osborne v. Ohio, the Court was cognizant of the Ohio legislature's sensitivity to a changing market when considering the constitutionality of a ban on possession. 495 U.S. 109-10. By the time of Osborne, the market for child pornography had been driven "underground" in response to traditional, economically based statutes like the ones prevalent during the time of this Court's decision in Ferber. Id. at 110. This change thus rendered the Ohio statute of waning efficacy. Id. at 110. It had thus become "difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." Id.

Just as the changing market that served as the backdrop for both Ferber and Osborne required new legislation, technological advents in the realm of graphic art necessitate the CPPA in its entirety. Advances in technology, combined with the prevalent accessibility to technological resources, have allowed the market for child pornography to evolve such that the absence of the CPPA will provide "safe harbor" for child pornographers, allowing the market to thrive. See e.g. U.S. v. Fox, 248 F.3d 394, 403 (5th Cir. 2001).

Furthermore, the eradication of the child pornography market is itself a compelling reason for the enactment of legislation aimed at its suppression. Osborne, 495 U.S. at 111. In Osborne, this Court expressly invoked not only the harm caused to minors actually used in the production of pornography, but also the danger posed to children when such pornography is used to seduce or coerce them into sexual activity. Id. Based on a specific finding of the Attorney

General, the use of child pornography for seduction was identified by this Court in Osborne as a compelling interest in support of upholding the Ohio statute. Osborne, 495 U.S. at 111 n. 7. Identifying the prevention of the seduction of minors as a compelling interest underscored the depth of this Court's meaning when in Ferber it expressly endorsed the destruction of the entire child pornography market as a justification for banning sexually explicit images of children. 458 U.S. at 760. Because of this compelling interest, Osborne means by implication that Ferber's holding is not limited to real children; the government has an interest in preventing the dissemination of even virtual images of child pornography. Osborne, 495 U.S. at 111.

Finally, the CPPA is narrowly tailored to address the government's numerous compelling interests because explicitly excludes those images that do not involve actual or apparent depictions of children in a sexually explicit manner. In its report, Congress states that the CPPA is not intended to apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor. J.A. 1:44. This intent is manifested by Congress' enactment of the 1988 Act, which requires all producers of pornographic material to verify the ages of all participants and maintain records of those ages along with the verifying identification. 18 U.S.C. § 2257 (2000). Similarly, the CPPA's affirmative defense narrowly tailors the applicability of the statute by declining to extend its coverage to situations where depictions use documented, adult persons and are not advertised or promoted as if they contain depictions of actual child pornography. 18 U.S.C. §2252A(c). Thus, the CPPA survives strict scrutiny because it is sufficiently narrowly tailored to address compelling government interests.

## III. THE NINTH CIRCUIT ERRED BY DETERMINING THAT THE CPPA IS UNCONSTITUTIONAL BECAUSE THE CPPA MEETS CONSTITUTIONAL STANDARDS FOR OVERBREADTH AND VAGUENESS.

This Court has held that imprecise laws can be attacked on their face under two doctrines: overbreadth and vagueness. Chicago v. Morales, 527 U.S. 41, 52 (1999). The overbreadth doctrine is a balancing test that permits facial invalidation of a statute when prohibitions of otherwise protected speech are substantial as judged in relation to the statute's plainly legitimate sweep. Id. A statute is impermissibly vague if it authorizes or encourages arbitrary and discriminatory enforcement. Id. at 56.

Respondents allege that the CPPA is unconstitutionally overbroad and vague because the statute defines prohibited material as any visual depiction where "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct" or "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the material is a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(B), (D) (1996). Under proper analysis, these allegations fail and the CPPA withstands constitutional challenges under overbreadth and vagueness.

### A. The CPPA Is Not Unconstitutionally Overbroad Because Any Protected Speech It Prohibits Is Slight In Relation To The Statute's Plainly Legitimate Sweep.

The challenged language, "appears to be a minor" and "conveys the impression," is not susceptible to attack under the overbreadth doctrine because any impediment to protected speech is insubstantial in relation to the interests served by the CPPA. Ferber, 458 U.S. at 769.

1. The application of a limiting construction substantially reduces the CPPA's potential infringement on protected speech.

Two factors combine to create a limiting construction of the statute under the overbreadth doctrine's balancing test, cementing the constitutionality of the CPPA. First, in order to be appropriately construed, the CPPA must be regarded with deference to the intent of Congress. Osborne, 495 U.S. at 112. Second, the CPPA must be interpreted to include the element of scienter. Id.; US v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994).

In Osborne, this Court showed the extent to which proper consideration of legislative intent limits an overbreadth challenge. 495 U.S. at 106. The statute in that case made it illegal to possess material depicting a child "in a state of nudity." Id. This Court held that the Ohio Supreme Court had the discretion to limit the reach of the statute by construing it with deference to the legislature's manifest intent. Id. The Ohio court's limiting construction prohibited only that material which depicted a minor in a state of nudity "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." Id. at 113. In upholding the Ohio statute as so limited, this Court avoided penalizing people for innocuous behavior. Id.

In the present case, the breadth of the statute's reach is adequately curbed by an appropriately guided interpretation of the statute. Congress has clearly indicated that the CPPA does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor. Hilton, 167 F.2d at 74. The legislative record further makes plain that the CPPA is intended to target only images that are virtually indistinguishable from photographs of actual children engaging in identical sexual conduct. Id. at 72. A ban on such images is necessary because the advent of technology and its ever-increasing accessibility creates fertile ground for the production of untraceable child pornography. Id. at 73. Drawings, cartoons, sculptures, and paintings depicting youthful

persons in sexually explicit poses are therefore plainly beyond the reach of the CPPA. Hilton, 167 F.2d at 71-72. Hence, as in Osborne, the threat posed by the CPPA to any innocuous conduct becomes negligible.

The second limiting factor, the presumption of scienter, is codified in the CPPA at 18 U.S.C. § 2252A(5)(B) (2000). This additional limiting protection, afforded by the knowledge requirement, was exercised by this Court in US v. X-Citement Video, Inc., 513 U.S. 64 (1994). That case involved the prosecution of a video producer under the 1988 Act for the use of a minor who had lied, in conjunction with her parents, in order to get work in pornographic films. Id.

By the time of X-Citement Video, the 1988 Act required every producer of sexually oriented material, obscene or not, to maintain records verifying that all actors and actresses used in the creation of the material were of legal age. Id. at 78. Although the element of knowledge was not specifically enumerated in either statute with regard to production of pornographic materials, this Court required the government to show that the accused believed that the actress in question was a minor in order to prosecute successfully under either section. Id. at 69. Thus, the fact that the producer had been duped in good faith into violating the statute was not enough to secure conviction.

In combination with the CPPA's statutory scienter requirement, the CPPA's affirmative defense offers assurance that those legitimate expressions of a sexual nature are not prosecuted. That defense exculpates any accused producer or distributor of sexually explicit material who can show that adults were used in the creation of the depictions in question. 18 U.S.C. §§ 2252(c), (d). Further, because the provision of the 1988 Act at issue in X-Citment Video still governs, the CPPA poses no further burden upon legitimate expression. See 18 U.S.C. § 2257.

Therefore, application of a proper limiting construction shows that the CPPA is constitutional under the overbreadth doctrine.

2. Any remaining threat to protected speech under the CPPA is incidental and insubstantial in relation to the CPPA's plainly legitimate sweep.

Under the preceding limiting construction, the CPPA meets an overbreadth challenge because there is little, if any, social value in the type of expression produced by adversely affected artists who deal in virtual child pornography indistinguishable from that which uses actual children. Hilton, 167 F.2d at 73. The Fourth Circuit concluded that virtual depictions of child pornography, when indistinguishable from those using actual children, do not deserve the protections of the First Amendment. Mento, 231 F.3d at 921. This Court's stance in Ferber, however, is more instructive. 458 U.S. at 761. Ferber concludes that work which contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. Id. Ferber's ruling thus means that even if such work is of "serious" value, such value would not indicate a substantial overbreadth when assessed in relation to the harms of child pornography. Id. Indeed, Ferber's very point was that the artistic merit of images such as those described by the CPPA is insubstantial to the point of irrelevance when compared to the harm to children caused by such images. 458 U.S. at 761-62; see Osborne, 495 U.S. at 111. The legitimate reach of the CPPA thus dwarfs its arguably impermissible applications. Cf. Ferber, 458 U.S. at 773.

Although the CPPA may create a slight risk that a person could be convicted of possessing child pornography that was actually produced using adults, any such risk is outweighed by the dangers of upholding a constitutional challenge. Mento, 231 F.3d at 921. The incidental risk of overbreadth could only be eliminated if the targeted language of the CPPA were altered or severed, in effect offering safe harbor to possessors and distributors of teen

pornography where the actors are not identifiable and allowing the market for child pornography to thrive. Mento, 231 F.3d at 921-22; U.S. v. Fox, 248 F.3d 394, 403 (5th Cir. 2001). In enacting the CPPA, Congress was particularly concerned that requiring the government to prove that depictions contained actual minors, would create a "built-in reasonable doubt argument" for almost every child pornography prosecution. Fox, 248 F.3d at 401.

In Fox, the Fifth Circuit upheld the constitutionality of the CPPA, finding that the language targeted by Respondents was neither overbroad nor vague. Fox, 248 F.3d 394. The court in Fox focused on the fatal lack of power which would befall the CPPA, and any attempted ban on child pornography, in the event of a sustained constitutional challenge. Id. at 401. For example, the government's computer expert in that case, was forced to concede under cross-examination that it is impossible to discern whether a computer image is real or virtual. Id. at 403. In the face of that reality it becomes clear that the statutory language "cannot be improved upon while still achieving the compelling government purpose of banning child pornography." Id.

Lending further weight to this argument, Petitioners respectfully point out that the Fifth Circuit's implication that "a high-resolution image resembling a real child [and virtually indistinguishable from an image captured using a real child]. . . can be generated wholly by computer graphics" is mistaken. Hilton, 167 F.2d at 65. Rather, the generation of such images without initially photographing or otherwise capturing an image is beyond the capabilities of currently available technology; such capability is viewed as the "holy grail" of both the computer graphics and pornography industries. Therefore even the "slight risk" pointed out by the Fourth Circuit is negligible in both fact and practice.

In addition to demonstrating proper application of the overbreadth doctrine, this Court's reasoning in Osborne further validates the CPPA. There, this Court made clear in dicta that even if reasonable means other than the statute existed for "drying up" the market, such means would not be adequate in light of the compelling interests that override the right of the individual to possess and produce child pornography. Osborne, 495 U.S. at 110. The CPPA is thus a necessary instrument in quelling child pornography.

Additionally, the overbreadth doctrine should only be used with hesitation, and as a last resort. Ferber, 458 U.S. at. 769. This Court in Ferber explicitly found that the "last resort" rationale should be applied in the present context involving the sexual exploitation of children. Ferber, 458 U.S. at 771. Proper application of the overbreadth doctrine therefore shows that the CPPA is constitutional.

B. The CPPA Is Not Unconstitutionally Vague Because It Provides Adequate Notice Of Prohibited Conduct And Does Not Authorize Or Encourage Arbitrary And Discriminatory Enforcement.

Vagueness may invalidate a criminal law for either of two independent reasons. Chicago v. Morales, 527 U.S. 41 at 56. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits. Id. Second, it may authorize and even encourage arbitrary and discriminatory enforcement. Id.

1. The language of the CPPA provides adequate notice of prohibited conduct because it is easily understood by an ordinary person.

In Morales, the Court struck down a city ordinance prohibiting occupying public space "with no apparent purpose" if a police officer reasonably believed them to be conducting gang activity. 527 U.S. at 56. In reaching its conclusion, the Court established that "a law fails to meet the [vagueness] requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." Id. at 56. For instance, if the

language of a statute fails to provide notice to the public of prohibited conduct it is unconstitutional. Id.

While the guideline of Morales is helpful, the facts of that case are easily distinguished from those now before the Court for at least six reasons. First, although dissuasion of gangs "hanging out" on the streets is no doubt important, there can be no argument that it is as compelling a government interest as the prevention of the sexual exploitation of children. Second, the word "purpose" would include virtually any activity; one's purpose can be a simple as standing outside in fresh air. Morales, 527 U.S. at 56-57. In contrast, the question of whether the subject of a photographic depiction "appears to be" a minor or is distributed in such a fashion as to "convey the impression" connotes an objective standard for the trier of fact. Mento, 231 F.3d at 922. In Morales that determination was made merely by the reasonable belief of the arresting officer. 527 U.S. at 59.

Third, a fatal flaw of the Morales statute was that an officer's instructions to disperse, taking place *after* the prohibited conduct was underway, could not possibly be considered to give adequate notice in lieu of sufficiently narrow statutory language. Id. at 59. Here, the notice is supplied by the statute, well in advance. Fourth, the Morales statute carried no element of scienter. Id. at 48. Here, scienter is codified. See 18 U.S.C. § 2252A(5)(B). Fifth, the legislative history of Morales bore no signs of a clear legislative intent that might come to the aid of the statute's other shortcomings. Id. at 57, n 23. In the case at hand, evidence of a distinct legislative intent, towards which courts must show deference, abounds. See e.g. Turner Broadcasting, 520 U.S. at 195-96. Sixth, the potential criminal repercussions for exercising a constitutional freedom under the Morales statute – standing on the sidewalk – far outweighed the

potential for legitimate prosecution of actual crime offered by the statute. Morales, 527 U.S. 41. Here, the gravity of the crime hugely outweighs the liberty infringed.

Moreover, it is simply untenable that an ordinary person is unable to grasp what is meant by the words "appears to be a minor engaged in sexual activity" or "conveys the impression that the material contains a visual depiction of a minor engaging in sexually explicit conduct." The courts of Illinois offer a practical example of this reasoning, having addressed this issue with regard to Illinois' child pornography statute, which defines a minor as "a person who is or appears to be . . . under the age of 18." 720 Ill. Comp. Stat. § 5/11-20.1(f)(7) (2001). The courts of Illinois have held that the language adequately protects vagueness concerns and that the jury should determine from the depiction in question whether the child is under the statutory age. People v. Schubert, 136 Ill. App. 3d 348 (Ill. 1st Dist. 1985); People v. Thomann, 197 Ill. App. 3d 488 (Ill. 4th Dist. 1990). The Illinois statute, explicitly acknowledged by this Court in Ferber, shows that the words "appears to be" are not enough to warrant a statute unconstitutionally vague. 458 U.S. at 764 n. 17.

Based on the foregoing principles, the Eleventh Circuit concluded that the CPPA defines the criminal offense with sufficient certainty: a reasonable person is on notice that possessing images appearing to be children engaged in sexually explicit conduct is illegal. U.S. v. Acheson, 195 F.3d 645, 652. The CPPA is not unconstitutionally vague because Congress' statements provide courts with a precise and limited understanding of the "appears to be" language which courts are obligated to follow. Mento, 231 F.3d at 921. Furthermore, when a statute is susceptible to two constructions, one which raises grave constitutional questions, and one by which such questions are avoided, the duty of the courts is to adopt the latter. Hilton, 167 F.2d at 71-72.

2. The CPPA does not authorize or encourage arbitrary and discriminatory enforcement because the trier of fact must consider the totality of circumstances.

Under the second part of the vagueness test, a statute that authorizes or encourages arbitrary and discriminatory enforcement is unconstitutional. Morales, 527 U.S. at 56. However, safeguards against arbitrary and discriminatory enforcement of the CPPA are substantial enough to overcome the second part of the vagueness test. Specifically, the CPPA's affirmative defense and scienter requirement, taken in conjunction with proper application of a limiting construction, create an incentive for focusing prosecutorial energy on the heart of the child pornography problem rather than on borderline cases that could go either way. Acheson, 195 F.3d at 652. For the same reasons, it is unlikely that people who inadvertently stumble across prohibited materials will be convicted, or that those pursuing endeavors of legitimate value will face criminal sanctions. Mento, 231 F.3d at 922. The reasoning of the First, Fourth, Fifth, and Eleventh Circuits is in sound agreement on this point. See generally Hilton, 167 F.3d at 75; Mento, 231 F.3d at 922; Fox, 248 F.3d at 407; Acheson, 195 F.3d at 653. Because of the CPPA's numerous, built-in protections against arbitrary and discriminatory enforcement, the statute is constitutional.

Moreover, consideration of policy urges upholding the constitutionality of the CPPA. The Internet, combined with developments in graphics editing technology, has created ripe new territory for an explosive, rampant, proliferation of child pornography. Under a statutory scheme lacking the benefits of the CPPA, the effects of advancing technology parallel those which necessitated the legislative reforms of the 1980's and 1990's. Those limitations were caused not only by changing market behavior, but also by increasing use of technology. See supra 3-5. Absent the CPPA, the ability of child pornographers to obscure the identities of their victims

obviates any attempt to prove the actual age of those victims. Furthermore, such perpetrators are able to evade the law by claiming that their images are 100 percent virtual.

In addition to creating a practicable ban on child pornography, the CPPA serves a strong governmental policy interest in closing off the legitimate adult pornography market from the use of child pornographers. The CPPA's prohibition of the promotion of sexually oriented materials so as to convey the impression that the materials contain images of actual child pornography is necessary in order to continue to afford protection to minors through every level of the pornography industry. Cf. Osborne, 495 U.S. at 111 n. 7. To that end, the CPPA's regulation of promotional activity is merely an extension of the 1986 Act's prohibition made applicable to today's world of technological capabilities. See supra 3-4.

Finally, prior to the enactment of the 1986 Act, this Court specifically endorsed the regulation of the promotion and advertising of pornography in order to protect children. Ferber 458 U.S. at 761. If freed from the promotional and advertising restrictions of the CPPA and aided by technology, child pornographers will be able to solicit initial interest in their wares and then offer actual child pornography only to those who meet their standards as bona fide "safe" customers. These criminals will then be able to excuse their promotional tactics either by claiming that the depictions promoted are virtual, when in fact they are edited depictions of actual children, or by presenting scores of legitimate, adult pornography and posturing as though the adult pornography is what had been promoted. The CPPA operates to prevent this conduct, thus working toward the government ends of shutting down the market for child pornography.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court REVERSE the judgment of the United States Court of Appeals for the Ninth Circuit and find the CPPA constitutional.

Dated: November 1, 2001

Respectfully submitted,

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